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June 14, 2013

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Ex-Parte Presentation in:

WC Docket No. 11-10, *Modernizing the FCC Form 477 Data Program*

WC Docket No. 07-38, *Development of Nationwide Broadband Data*

WC Docket No. 08-190, *Service Quality, Customer Satisfaction and Data Gathering*

WC Docket No. 10-132, *Review of Wireline Competition Bureau Data Practices*

WC Docket No. 10-175, *Free Press Request to Review Form 477 Data*

WT Docket No. 10-131, *Review of Wireless Telecommunications Bureau Data Practices*

Dear Ms. Dortch:

On Wednesday, June 12, the undersigned, Free Press Research Director Derek Turner spoke by phone with Commission staff to discuss the contents of the draft Order in the above captioned dockets currently on the June 27 open meeting tentative agenda. Commission staff on the call included Jamie Susskind, Carol Simpson, Lisa Gelb, Steve Rosenberg, Rodger Woock, Chelsea Fallon, Paroma Sanyal, and Ken Lynch.

On the call, I expressed Free Press' deep disappointment with the draft item. Despite the strong, well-documented need for the agency to collect and disseminate better data to facilitate competition analysis, the draft item does not adopt any of the recommendations made in the National Broadband Plan or by the Department of Justice concerning this matter.

The Commission's broadband data collection efforts have been the subject of controversy for nearly a decade. The agency's prior methodology considered an entire ZIP code to be served if one single ISP reported at least one single customer in that ZIP code. Apologists for the broadband market's failings used this flawed methodology to claim that 99 percent of Americans had access to broadband, and that the average American was served by 8 providers. This plainly absurd result, and recognition of the need for adequate data to monitor market competition, helped catalyze the 2007 proceeding that resulted in substantial reforms to Form 477 – many suggested by Free Press.¹

¹ See *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband*

The resulting 2008 Order made some very important improvements, such as moving to a Census-based reporting system and collecting actual subscriber numbers, producing data that could be used in numerous ways to analyze the state of market competition. But the 2008 Order also left much unfinished business. Collecting subscriber information at the Census Tract level was an improvement over ZIP codes, but it was not granular enough, especially in rural areas. The 2008 Order also failed to require reporting of pricing data. However, the 2008 Order included a Further Notice tentatively concluding the Commission should collect pricing data in order to facilitate competition analysis, as well as tentatively concluding that the Commission should move to a more granular block-level reporting system for availability data.

Work on the 2008 Further Notice was subsumed by the Commission's far-reaching work on the National Broadband Plan. However, the National Broadband Plan affirmed the tentative conclusions in the Further Notice. The first recommendation in the Plan's executive summary was for the Commission to "collect, analyze, benchmark and publish detailed, market-by-market information on broadband pricing and competition...."² The Plan also called for the Commission to "implement a process to make additional data that is not accessible by the public available to academic researchers and others, subject to appropriate restrictions to protect confidentiality of competitively sensitive materials." The latter recommendation came about because the Commission's analysis of the Form 477 data did not make full use of it, particularly failing to conduct any type of competition analysis with the detailed subscriber count data. This analytical failure was noted in an FCC blog post authored by former OSP Chief Paul de Sa and former WCB Chief Sharon Gillett.³

In addition to the National Broadband Plan's data recommendations, the Department of Justice also filed official comments calling on the Commission to collect pricing data:

"Under the Broadband Data Improvement Act, the Commission is already gathering detailed information on broadband deployment and subscribership, including technologies used and speeds actually delivered to consumers. Although this data collection is critical, the Commission should expand its efforts to include an assessment of the nature and extent of competition in each local broadband market.

For example, additional detail on the pricing plans being offered, and on subscriptions to those plans, will be invaluable for the purpose of assessing

Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, Order on Reconsideration, 23 FCC Rcd 9800 (2008) ("2008 Order and FNPRM").

² Federal Communications Commission, *Connecting America: The National Broadband Plan*, Omnibus Broadband Initiative, Mar. 16, 2010, p. XI.

³ Sharon Gillett, Chief, Wireline Competition Bureau and Paul de Sa, Chief, Office of Strategic Planning and Policy Analysis, "Tracking broadband data...", *Blogband*, Feb. 15, 2010. ("However we recognize that the Form 477 data could still be improved. To take one example, the current report does not provide sufficient information to assess competition.").

broadband competition. This information can be used to compare competition across locales, not only in terms of the number of providers and their market shares, but also in terms of the prices they charge for various broadband services. Because the broadband market is always evolving, more granular price and product data will facilitate the tracking of prices, terms, and conditions over time for a number of popular plans offered in a given locale. In principle, by looking across geographic areas, and by relying on data measuring how demand and cost conditions vary across locales, this information can be used to estimate the benefits consumers enjoy from additional broadband competition. In short, we commend the Commission for gathering more detailed information on infrastructure, availability, and actual speeds delivered to customers and recommend that this effort go further to facilitate more effective market monitoring.”⁴

On the call with Commission staff, I expressed profound disappointment that the draft order fails to adopt these DoJ and Broadband Plan recommendations to collect pricing data. Even if it were true that such collection is complex, as some providers claim, complexity is no excuse for inaction, especially considering the length of time this issue has been before the Commission. I suggested that as an interim measure, before collecting granular pricing data from every reporting provider, the Commission could conduct large-scale pricing surveys similar to the one performed on an annual basis by the Media Bureau in the multichannel video market. I suggested as well that the survey could be structured in a way to draw conclusions about prices in markets with differing demographic and geographic characteristics.

I also expressed confusion as to why the draft order fails to adopt the Broadband Plan’s recommendation to make the underlying Form 477 data available to outside researchers pursuant to a confidentiality agreement or protective order. The agency routinely makes confidential and highly confidential third-party data available to outside parties under protective orders, and has repeatedly made proprietary data available to outside parties in the context of the proceedings reviewing the agency’s media ownership rules.

Apparently, what the draft order does is pick up the NTIA's soon-to-be discontinued effort of collecting broadband availability data at the Census block level. While it is important to continue to monitor availability at this granular level, we must not abandon the equally, if not far more important, needs to collect pricing data and to open the data up to outside analysts. I suggested that there should be no rush to close the door on these important questions, especially considering the Commission’s unfortunate track record of not adequately using the information it already collects.

Arguably the only thing the Commission would do with the census-block availability data is use it to identify unserved blocks for the purposes of identifying areas that need subsidies from the Connect America Fund. However, those areas have already been identified by the NTIA; and

⁴ See *Ex Parte* Submission of the United States Department of Justice, GN Docket No. 09-51, at 19-20 (filed Jan. 4, 2010) (“DOJ *Ex Parte*”).

the CAF is based on a cost-model and right-of-first refusal, where the data is less important because ILECs and their competitors make their cases for areas either being served or not.

But even here, the Order is fatally flawed. It abandons NTIA's practice of using the more granular road-segment reporting for geographically large census blocks, which are all in rural areas. If the immediate need for the data is verification of CAF eligibility, then the Commission should be increasing the granularity of reporting in currently identified unserved areas, not decreasing it. In remote rural areas, census blocks are often one and the same as counties, sometimes hundreds of square miles in area.

Because of these shortcomings, I strongly suggested the Commission pull the draft from circulation. This would give the Commission staff time to solicit more input from the public interest and research community. Also, in light of the fact that the Commission is currently operating without a full complement of Commissioners and with the apparent belief that these issues are the subject of controversy, it does not seem prudent to rush to close the door on this proceeding at this time. I suggested that if the Commission truly felt there was an immediate need to continue the NTIA's data collection, then it should issue a narrow order on that aspect while seeking further comment on the other matters in a further notice.

Free Press files this letter pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. §1.1206(b). Please contact the undersigned should you have any questions.

Respectfully submitted,

/s/ S. Derek Turner

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